THE USE AND ENFORCEMENT OF SOFT LAW BY AUSTRALIAN PUBLIC AUTHORITIES

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ABSTRACT

Soft law is a pervasive phenomenon which is highly effective as a means of regulation in Australia, as it is in many other jurisdictions. This article will not focus on the regulatory aspects of soft law, but will examine the capacity of individuals to obtain remedies where public authorities fail to adhere to the terms of their published soft law. The available judicial remedies apply in very limited circumstances, both in private law actions (in tort or equity) and public law (judicial review) actions. Ultimately, the most effective ways to remedy breaches of soft law appear also to be 'soft', such as recommendations of the Ombudsman and discretionary schemes for ex gratia payments.

INTRODUCTION

'Soft law' sounds distinctly like an oxymoron: if it is soft, how can it be law? Yet, it has been understood for decades that instruments which are not legal in the formal sense may nonetheless be powerful because they are commonly treated like law. Soft law instruments often 'go by the name “quasi-legislation,” on the basis that they are almost laws'. Soft law is used frequently as a regulatory tool because it is immensely effective as a means of regulating conduct. This article will feature no analysis of how and why that is the case — others have performed that task far better than I could. Rather, this article is written from the point of view of those who are subject to public soft law regulation. It is focused on the remedies available in Australia to individuals who have

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1 This recognition is usually traced back to a short piece in the Law Quarterly Review by Robert Megarry: R E Megarry, 'Administrative Quasi-Legislation' (1944) 60 Law Quarterly Review 125.


relied on soft law issued by a public authority, upon which that authority then refuses to act.

I have divided the article into four major parts. Part I looks at the phenomenon of soft law in Australia from the point of view of those being regulated and introduces the case of *Griffith University v Tang*. Part II looks at public law judicial remedies and Part III at private law judicial remedies. Part IV then examines non-judicial remedies. Each part considers, either explicitly or implicitly, the difficulties that arise when soft law is treated as 'law' by the people to whom it is directed, but merely as 'soft' by the repositories of discretionary power who have the power to make decisions about its application. The asymmetrical operation of soft law is, in this sense, its defining feature and the chief concern of this article.

I WHAT IS SOFT LAW?

Soft law means different things to different people. Stephen Argument has noted that 'one of the most difficult issues in dealing with quasi-legislation is to work out exactly what sort of creature quasi-legislation is'. Indeed, as a generic term, there is an argument that 'soft law' conceals as much as it reveals, making it at best unhelpful and at worst a 'misleading simplification'.

Many attempts to classify soft law have been compelled simply to list various types of soft law instruments. This approach, while instructive, does not lead to a definition since soft law instruments occupy a broad section of the spectrum between unstructured discretion and legislation. As time has gone by, the problem has been one of ascertaining which of this 'wide variety of instruments' are included within the broad term 'soft law'.

It is interesting to note that attempts to define soft law by listing its varieties serve mainly to nominate instruments which could be either delegated legislation on one hand or soft law on the other, depending on whether their creation has been expressly

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4 (2005) 221 CLR 99 (*Tang*).
5 Stephen Argument, 'Quasi-legislation: Greasy Pig, Trojan Horse or Unruly Child?' (1994) 1(3) *Australian Journal of Administrative Law* 144, 144 (emphasis in original).
authorised by Parliament. Codes of practice, guidance, guidance notes, circulars, policy notes, development briefs, practice statements, tax concessions, codes of conduct, codes of ethics and conventions will all generally fall into the latter category. However, listing different soft law instruments is an unsatisfactory manner in which to define soft law, with such lists tending ‘to be over-inclusive, while not giving sufficient information to enable a classification to be made’. Such lists must therefore be seen as providing examples of what soft law includes instead of being definitive of what soft law is. As Creyke and McMillan have warned, ‘it is what an instrument does, not what it is called, that is important’. Nonetheless, the types of instrument included within the term 'soft law' remain elusive.

The definition of soft law in Australia is generally best expressed negatively or, in other words, by what it isn’t. It isn’t primary legislation, which is enacted by Parliament. Nor is it delegated (or ‘secondary’) legislation, which is made subject to the express authority of Parliament. These are forms of 'hard' law. Robert Baldwin described what is left as 'tertiary' legislation, which he defines as ‘usually’ being made without an express power to legislate conferred by an Act of Parliament, without which there is no, or at least unclear, statutory authorisation ‘to make directly enforceable rules’. At Commonwealth level in Australia, this debate has been subsumed into the threshold issue under the Legislative Instruments Act of what

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12 Ibid. This was also the guiding principle behind the Legislative Instruments Act 2003 (Cth).

13 An example of the sometimes elusive nature of soft law can be observed in the UK Supreme Court's recent decision in Bank Mellat v Her Majesty's Treasury (No 2) [2013] 3 WLR 222, in which HM Treasury was empowered by statute to make directions by means of a statutory instrument in response to risks ‘arising from terrorist financing, money laundering [or] nuclear proliferation’ (223 [4] per Lord Sumption). Ordinarily, an instrument made under direct statutory authority would automatically be classified as hard law, but the Supreme Court seemed to view the order as something out of the ordinary, a 'hybrid' instrument over which Parliament exercised significantly reduced oversight: 242 [48] (Lord Sumption), 246 [61] (Lord Reed), 265 [134] (Lord Hope). Nothing came directly from the Supreme Court's suspicion that the relevant instrument was not hard law of the usual sort, the case being determined in Bank Mellat's favour, by majority, on other grounds. However, it is salutary to note this case as an example of the point that identifying soft law based upon set categories of instruments is ultimately, at best, a limited approach to the issue.


15 Ibid 80. It must be said that this formulation rather begs the question of when legislation will fail to amount to delegated or secondary legislation as 'usual'.

16 Legislative Instruments Act 2003 (Cth). This Act has been described as the 'single most important development in delegated legislation for at least half a century': Stephen Argument, 'Delegated Legislation' in Matthew Groves and H P Lee (eds), Australian Administrative Law: Fundamentals, Principles and Doctrines (Cambridge University Press, 2007) 134, 135.
constitutes a 'legislative instrument'. This inquiry is aimed at the function of an instrument, although in practice most statutes now specify whether the Act is to apply.\textsuperscript{17} It is clear that (at Commonwealth level in Australia) secondary legislation is any instrument ‘of a legislative character\textsuperscript{18} or is within a list of nominated instruments.\textsuperscript{19}

Policy ‘is not necessarily imposed from the top’ but ‘may evolve at ground level and permeate upwards.’\textsuperscript{20} There is a lengthy history of leaving exercises of discretion to those better equipped than legislative draftsmen to exercise it in the circumstances.\textsuperscript{21} Arthurs gives the example that emigration officers, who understood maritime engineering, were better able to decide whether ships were ‘seaworthy’ than Parliament. Parliament, in turn, recognised the expertise of the officers and transferred its responsibility to these members of the administration, who then formulated technical manuals as a means of structuring their statutory discretion.\textsuperscript{22} Where Parliament has made an informed decision to delegate its legislative authority in this way, the exercise of that authority must be recognised as ‘law’. Difficulties arise when manuals which are treated as ‘law’ remain ‘soft’, in the sense that they cannot be enforced against the will of the party to whom discretionary decision-making power has been granted. In other words, the central problem with soft law is its asymmetrical operation.

There is also a lengthy history to recognising the problems which can arise from soft law regulation. As long ago as 1944, R E Megarry noted that ‘administrative quasi-legislation’ had invaded a legal world previously ‘bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions’.\textsuperscript{23} Megarry divided this phenomenon into two categories: ‘the State-and-subject type, consisting of announcements by administrative bodies of the course which it proposed to take in the administration of particular statutes’ and ‘the subject-and-subject type, consisting of arrangements made by administrative bodies which affect the operation of the law between one subject and another’.\textsuperscript{24} Megarry was understandably more concerned with the effect of soft law than its aims, and consequently was prepared to praise

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  \item \textsuperscript{17} Pearce and Argument, above n 2, 31–2. This has the effect that much of the debate that previously surrounded the difference between secondary and tertiary legislation is now moot.
  \item \textsuperscript{18} Legislative Instruments Act 2003 (Cth) s 5(2).
  \item \textsuperscript{19} Ibid s 6. Certain categories of instrument have also been expressly declared not to be legislative instruments under the Act: at s 7.
  \item \textsuperscript{20} Carol Harlow and Richard Rawlings, Law and Administration (Cambridge University Press, 3rd Ed, 2009), 196.
  \item \textsuperscript{21} H W Arthurs, ‘Without the Law’: Administrative Justice and Legal Pluralism in Nineteenth-Century England (University of Toronto Press, 1985) 137.
  \item \textsuperscript{22} Ibid.
  \item \textsuperscript{23} Ibid, above n 1, 125–6.
  \item \textsuperscript{24} Ibid 126. See also Pearce and Argument, above n 2, 15. For examples of ‘codified discretion’ from even earlier than this, see Arthurs, above n 21, 136; Edward Page, Governing By Numbers: Delegated Legislation and Everyday Policy-Making (Hart Publishing, 2001) 13. For an account of the history of rule-making in the USA, see Cornelius M Kerwin, Rulienaking: How Government Agencies Write Law and Make Policy (CQ Press, 2nd ed, 1999) 7–22. For an account of the history of rule-making in the UK, see Paul P Craig, Administrative Law (Sweet & Maxwell, 7th ed, 2012) 434–7.
\end{itemize}
practice notes issued by the War Damage Commission as being ‘shining examples of official helpfulness’ in so far they ‘deal with procedure or state the official view of a doubtful point that will be taken until the Courts rule otherwise’. In this respect, Megarry departed from the traditional Diceyan approach to the administrative state.

Megarry considered the phenomenon of soft law to be a ‘curate's egg’, which is to say that the negative aspects of soft law nullified the benefits of its positive aspects. He described similar official announcements as ‘regrettable’, where they contradicted or were inconsistent with statutory provisions, with the effect that ‘the statute remains unaltered on the statute book but ceases to represent the effective law’, because:

although no Court would enforce them, no official body would fail to honour them, and as they are not merely concessions in individual cases but are intended to apply generally to all who fall within their scope, the description of ‘quasi-legislation’ is perhaps not inept.

Megarry’s complaint can therefore be understood to be that state entities were able to issue announcements which had the practical status of legislation, even in the absence of its legal status, without legislative scrutiny and which, while open to challenge in court, were unlikely to be so challenged. Megarry considered this quasi-legislative effect to be of greater import than the purpose for which the soft law might be employed, and this remains a core concern with soft law regulation to this day.

Many soft law instruments which have an effect on businesses, particularly industry codes of conduct, do bind organisations, but achieve this end as a matter either of contract or consent rather than due to the binding effect of the soft law instrument per se. In effect, adherence to an industry code of conduct is a condition of membership of the industry body which has issued the code and, where the code is in contractual form, it is in effect hard law as a result. Governments are also able to set standards through the medium of placing certain requirements on parties with whom

25 Megarry, above n 1, 126.
26 The traditional Diceyan approach to the administrative state was typified by Lord Hewart CJ, who considered the rise of the administrative state to be diametrically opposed to the imperatives of the rule of law: Baron Gordon Hewart, The New Despotism (E Benn, 1929) 37. See also F A Hayek, The Road to Serfdom (Routledge and Kegan Paul, 1944). These followers of the theories of A V Dicey would not likely have been prepared to concede any positive aspects to guidelines being issued by executive agencies, regardless of their benign intention or positive effect.
28 Megarry, above n 1, 126.
29 In this sense, Megarry did reflect a concern with the damage done to the ‘symmetry’ of the law that is reminiscent of Dicey, although no less valid for it. Dicey took the view that judges ‘are much more concerned than Parliament to maintain ‘the logic or the symmetry of the law’: H W Arthurs, ‘Rethinking Administrative Law: a Slightly Dicey Business’ (1979) 17(1) Osgoode Hall Law Journal 1, 15. Arthurs was quoting A V Dicey, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century (Macmillan, 2nd ed, 1962) 364.
they enter contracts. In its Complex Regulation Report, the Administrative Review Council noted that the effect of such soft law instruments is analogous to decisions of the Superannuation Complaints Tribunal (SCT), to which trustees of Australian superannuation funds bind their trusts by contract in order to allow the trusts to obtain certain tax concessions, in making the point that, to the extent that the operation of these codes is subject to accountability, it is by methods outside the scope of administrative law.

It nonetheless remains true that most soft law does not bind individuals to a course of action, but is no less effective for all that. Recent Australian interest in soft law has been driven by a case which illustrates this point effectively: Griffith University v Tang.

A Griffith University v Tang
Vivian Tang was a PhD student at Griffith University. She was found to have engaged in academic misconduct and was excluded from the degree programme in which she had been enrolled. Ms Tang argued that the University’s soft law misconduct code (the ‘Policy on Academic Misconduct and the Policy on Student Grievances and Appeals’) had been breached by the University in making its decision to exclude her, on the basis that she had not been given procedural fairness. A majority of the High Court concluded that the appellant University not only had not exercised public power in

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31 Kerwin, above n 24, 28. A recent example of government contracting being used as a form of legislation was the subject of the litigation in Williams v The Commonwealth (2012) 248 CLR 156. The High Court held that the Commonwealth lacked contractual power equivalent to its legislative capacities under s 51 of the Constitution and denied that it had all the powers of a natural person. It held invalid the arrangements under which the Commonwealth had entered into contracts for the provision of chaplaincy services and spent money to perform its obligations under those contracts.

32 Administrative Review Council, above n 30, 14. This analogy is imperfect, mainly due to the fact that, although the SCT obtains jurisdiction by consent, this is at the option of the trustee of a superannuation fund rather than the beneficiary who will bring a complaint to the SCT; see Greg Weeks, Superannuation Complaints Tribunal and the Public / Private Distinction in Australian Administrative Law (2006) 13(3) Australian Journal of Administrative Law 147; Gail Pearson, Financial Services Law and Compliance in Australia (2008) 490. Additionally, as a majority of the High Court noted in obiter dicta in Breckler, while the trustees of the relevant fund in that matter elected to submit to the jurisdiction of the SCT, they were left with no practical option to do otherwise and that ‘cases may be readily imagined where it would be a breach of trust not to exercise the election so as to obtain the revenue benefits which follow’: Attorney-General (Cth) v Breckler (1999) 197 CLR 83, 111 [44] (’Breckler’).

33 The issues which arise from this point, while important, are beyond the scope of this article.

34 Soft law was the subject of a government report some 14 years ago: Commonwealth Interdepartmental Committee on Quasi-regulation, Grey-letter law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation (1997) (Grey-letter Law Report). It then remained largely unconsidered in Australia until the publication of Aronson, above n 9. This led to Professor Aronson being described as soft law’s ‘Australian Prince Charming’: Creyke and McMillan, above n 11, 377.

removing Ms Tang from its PhD programme, but that it had not exercised power at all because its relationship with Ms Tang was entirely consensual.36

There has been a palpable level of academic disappointment with the result in Tang,37 despite the fact that the end result was ‘entirely predictable’38 because Ms Tang had brought her action under the Judicial Review Act 1991 (Qld), which allowed review only of decisions made ‘under an enactment’.39 The decision of the University was certainly not ‘under’ the Griffith University Act,40 for the reasons given by the majority. Furthermore, as Justice Keane has pointed out more than once, the result was inevitable given the way in which it was argued on behalf of Ms Tang.41 However, if the purpose of judicial review is to curb power, rather than only statutory power,42 then all that should matter is that ‘law’ is applied through an exercise of public power.43 This excludes exercises of power which gather their force from private arrangements,44 most usually contractual,45 and this is as it should be. Professor Aronson argued that the reason why consensual power should not be subject to judicial review is because it is not public, not because it is non-statutory.46 There is

36 Ibid 131 [91] (Gummow, Callinan & Heydon JJ).
38 Aronson, above n 9, 23.
39 In which sense the Queensland legislation was relevantly identical to the Administrative Decisions (Judicial Review) Act 1977 (Cth) (‘ADJR Act’).
40 Griffith University was established under the Griffith University Act 1998 (Qld).
41 See Keane, above n 37, 632–3; Chief Justice Patrick Keane, ‘Democracy, Participation and Administrative Law’ (Speech delivered at the AIAL National Lecture, 2011 National Administrative Law Conference, Canberra, 21 July 2011). It is noteworthy, for example, that Ms Tang’s legal representatives did not seek to argue her case under the common law, given that common law judicial review remedies and actions have effectively been preserved by Part 5 of the Judicial Review Act 1991 (Qld). This case is not an isolated example of failing to seek common law judicial review in the alternative where a statutory judicial review scheme is in place; see, eg, King v Director of Housing [2013] TASFC 9.
42 A legal limit and its judicial supervision are frequently linked; see Mark Aronson and Matthew Groves, Judicial Review of Administrative Action (Thomson Reuters, 5th ed, 2013) 114–15. This is subject to the power in question being justiciable.
43 Reform of the ADJR Act has been proposed; see Administrative Review Council, Federal Judicial Review in Australia, Report No 50, (2012), [4.11]–[4.21]. So far, it has come to nothing. Such arrangements are said to be consensual, rather than resulting from an exercise of public power: Tang (2005) 221 CLR 99. However, the Tang majority’s binary distinction between ‘power’ on one hand and ‘consent’ on the other is deeply unsatisfying. Their Honours failed to engage with the debate about whether public power can ever be exercised by a private body, which lent their ultimate reasoning a somewhat unreal air.
44 See the discussion of the law relating to the requirement that, to be reviewable in Australia’s statutory judicial review jurisdiction (ADJR Act), a decision must be made ‘under an enactment’: Aronson and Groves, above n 42, 91–101. The ADJR Act is notable for restricting review to exercises of statutory power only, and in this regard has failed to keep pace with developments as old as Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374, (‘GCHQ Case’). See generally Mark Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (2004) 15(3) Public Law Review 202.
45 Aronson, above n 9, 23.
significant overlap between the concepts of law and public power, but their similarities are not absolute. Their key difference from the point of view of judicial accountability is that the former is subject to judicial review and the latter is not.

It is submitted that what is important from the point of view of accountability is the way that power is exercised in fact and not whether it meets a formalist definition of 'law'. On this reasoning, what was disappointing in Tang was not the result but the reasoning pursued by the majority, which set up 'power' and 'consent' as binary opposites in a wholly unconvincing fashion. There is no doubt that the relevant soft law policy issued by the University did in fact regulate the interactions between Ms Tang and the University. The disappointing aspect of Tang is truly only in the court's disengagement from examining the possibility of expanding the scope of judicial review in the face of such circumstances. To reach the conclusion that the power exercised by the University was consensual without consideration of its publicness is deficient on this reasoning, a comment which has no bearing on the undoubted correctness of Tang's outcome.

II JUDICIAL REVIEW REMEDIES

In Australia, courts performing judicial review may not take account of the factual merits of a matter. In one of the most quoted passages in Australian administrative law, Brennan J put it thus:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.

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48 It is not hard to think of examples of circumstances which are consensual in a formal sense but where one party has little to no power. Standard form contracts for the provision of utility services are an obvious example.
49 Likewise, there is no doubt that Ms Tang could have challenged the University's decision on the ground of procedural unfairness, either at common law or under statutory judicial review, if the relevant soft law instruments had been delegated legislation: Aronson, above n 9, 15; Aronson and Groves, above n 42, 91.
50 For an overview of the Australian judicial review system, see Administrative Review Council, Judicial Review in Australia, Consultation Paper (2011) 35–50.
51 Attorney-General (NSW) v Quin (1990) 170 CLR 1, 35–6 ('Quin').
As a consequence, judicial review’s remedies are axiomatically no more than procedural in nature.\textsuperscript{52} Under the Constitution, certain remedies are always available against officers of the Commonwealth\textsuperscript{53} who commit jurisdictional errors in the exercise of their powers or duties.\textsuperscript{54} The High Court’s jurisdiction\textsuperscript{55} to grant these remedies is entrenched.\textsuperscript{56} At Commonwealth level, Australia also has a statutory judicial review scheme,\textsuperscript{57} which largely mirrors the grounds for review\textsuperscript{58} and remedies\textsuperscript{59} available under the general law and the Constitution.

The remedies entrenched in the Constitution are the constitutional writs of mandamus (to compel the performance of an unperformed duty of a public nature)\textsuperscript{60} and prohibition (to prohibit a decision-maker from doing a future act, or continuing with a course of action already commenced, which is beyond his or her jurisdiction)\textsuperscript{61} and the equitable remedy of injunction, a flexible remedy able to prohibit (or, on rare occasions, compel) administrative action where the applicant’s interests\textsuperscript{62} are at stake.\textsuperscript{63} Additionally, the High Court has jurisdiction ancillary\textsuperscript{64} to that granted by s 75(v) of the Constitution to grant the writ of certiorari (to quash a decision affected by jurisdictional error)\textsuperscript{65} in order to ensure the effectiveness of the constitutional writs. It also has an inherent power to grant declaratory relief.\textsuperscript{66}

The availability of one or more of these remedies is generally proved by proving breach of at least one of the set grounds of judicial review.\textsuperscript{67} The problem for a person

\textsuperscript{52} For a summary, see Stephen Gageler, ‘Administrative Law Judicial Remedies’ in Groves and Lee, above n 16, 368.
\textsuperscript{54} Constitution s 75(v). Jurisdictional error is not required where the remedies of injunction or declaration are sought; an error of law will suffice.
\textsuperscript{55} In practice, it is often exercised by the Federal Court of Australia pursuant to a statutory grant of jurisdiction: Judiciary Act 1903 (Cth) s 39B.
\textsuperscript{56} Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, (‘Plaintiff S157’). Kirk extended the importance of jurisdictional error to the Supreme Courts of each of the Australian States and means that their jurisdiction to award certain remedies inherent to their status at the time that they were formed cannot be excluded by legislation: Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531, (‘Kirk’).
\textsuperscript{57} ADJR 1977 (Cth).
\textsuperscript{58} Ibid s 5.
\textsuperscript{59} Ibid s 16(1).
\textsuperscript{60} Aronson and Groves, above n 42, 805.
\textsuperscript{61} Ibid 775.
\textsuperscript{62} See Onus v Alcoa of Australia Ltd (1981) 149 CLR 27 (‘Onus v Alcoa’).
\textsuperscript{63} See Gageler, above n 52, 371; Aronson and Groves, above n 42, 911.
\textsuperscript{64} Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, (‘Aala’).
\textsuperscript{65} Aronson and Groves, above n 42, 777. Certiorari will also lie to quash an impugned decision for non-jurisdictional error of law on the face of the record, a remedy usually relevant only to review of the decisions of inferior courts: Craig v South Australia (1995) 184 CLR 163, 175–6, 180–3 (‘Craig’).
\textsuperscript{67} See Aronson and Groves, above n 42, 18; Craig (1995) 184 CLR 163, 177–8; Kirk (2010) 239 CLR 531, 573 [71].
who wishes to have the benefit of soft law is that traditional administrative law doctrine, coupled with the High Court’s narrow approach to the enforceability of soft law in *Tang*, means that breach of soft law in Australia will rarely be relevant to obtaining judicial review remedies.

A The rule against fettering

One of the reasons for this is that enforcement of soft law would generally fall foul of the rule against improper fettering of discretion. Classically, a decision-maker who inflexibly applies rules or policies without listening to submissions that an exception be made, commits a jurisdictional error. This position is usually justified on the basis that it is generally preferable for the potential breadth of statutory discretions granted to public decision-makers not to be fettered, even by their own representations, in reaching the decision which is most beneficial for the public at large. Usually, the no-fettering principle is invoked where a decision-maker imposes restraints on him- or herself by adhering to the terms of a soft law instrument which impermissibly narrows the scope of his or her discretion such that he or she does not take account of the merits of an individual applicant’s case, but it cuts both ways. A decision-maker will not commit a jurisdictional error by disappointing an applicant’s expectation that the terms of a soft law instrument would be adhered to in all circumstances; nor is a jurisdictional error committed by the mere fact of having a policy or rule. Jurisdictional error is caused by a rule applied consistently but without regard to the merits of the individual case.

There have been numerous cases which have recognised that soft law is necessary, particularly in relation to high-volume decision-making. From such judicial acceptance, it follows that soft law must be *intra vires*, subject to the prohibition of fettering. This does not provide a bright-line test, since the entire point of soft law is that it will guide decision-makers into making decisions which are at least broadly consistent with each other. Much as Brennan J accepted in *Re Drake and Minister for Immigration and Ethnic Affairs (No.2)*, there is a balance which needs to be struck between ensuring that each case is decided on its merits but not giving the impression of arbitrariness by allowing different results in cases which are substantially alike.

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68 These terms are often used interchangeably; see eg, Craig, above n 24, 542.
69 See *British Oxygen Co Ltd v Ministry of Technology* [1971] AC 610, 625 (Lord Reid) (‘British Oxygen’).
70 See Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2nd ed, 2012) 145–6. This principle shares much common ground with the authorities, discussed below, which have heavily constrained the availability of public law estoppel in Australia.
71 *R v London County Council; Ex parte Corrie* [1918] 1 KB 68, (‘Ex parte Corrie’); *Green v Daniels* (1977) 13 ALR 1.
73 This passage owes a debt to Chapter 3 of Aronson and Groves, above n 42. See also Emily Johnson, ‘Should ‘Inconsistency’ of Administrative Decisions Give Rise to Judicial Review?’ (2013) 72 Australian Institute of Administrative Law Forum 50.
74 (1979) 2 ALD 634 (‘Drake (No.2)’).
Aronson and Groves have commented that:

If the courts were to acknowledge the intolerable pressures produced by prohibiting the fettering of discretions handling high-volume caseloads, they could modify the rule against fettering so as to allow the development of a requirement that discretionary powers be exercised consistently. In developing ‘inconsistency’ as a ground of judicial review, the courts could then explore the possibilities of giving more force to non-statutory guidelines.  

The suggestion made by Aronson and Groves that the rule against fettering be modified is persuasive, albeit not without difficulty since it challenges the ‘judicial review mantra’ that decisions ought to be based on the individual merits of each case. The learned authors point out that it is, essentially, the prohibition of fettering that prevents soft law from being treated in exactly the same way as hard law in court proceedings. Furthermore, they regard the rule against fettering as being at odds with ‘the requirement (in certain circumstances) that those deciding like cases should treat subjects consistently’. The requirement that cases be treated consistently depends extensively, of course, on the level of detail in which like cases are considered in order to be judged to be ‘alike’. 

Take for example the case of MLC Investments v Commissioner of Taxation, in which the Commissioner’s delegate had a broad statutory discretion to allow a company to end its accounting period on a date other than 30 June in any given year but treated as decisive two taxation rulings which had been issued by the Commissioner which severely curtailed this discretion to circumstances, inter alia, in which there was a ‘substantial business need’, where the change was not for mere administrative convenience or competitive advantage, and ‘where the most exceptional circumstances exist’. Lindgren J held that the delegate fell into error by purporting to make a decision which was consistent with current ATO policy rather than exercising the full discretion available to him under statute. With respect, this decision must be correct, otherwise the court would have taken as binding the interpretation of the statute contained in the rulings rather than reaching its own view.

However, there is nothing in this decision which would prevent courts from accepting that soft law, once issued, cannot simply be ignored. To the extent that

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75 Aronson and Groves, above n 42, 159-60 (citation omitted).
77 Aronson and Groves, above n 42, 292–3.
78 Some consideration is given to this point in Johnson, above n 73.
79 (2003) 137 FCR 288. Aronson and Groves use this case as the archetype of situations in which consistency and the rule against fettering are in direct tension: Aronson and Groves, above n 42, 160 (n 336); 293 (n 115).
81 Here in relation to ADJR Act s 5(2)(f). The result would have been the same at common law.
83 By which I mean accepting explicitly. There is already plenty of implicit suggestion from courts that soft law must mean something; see, eg, Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia (2010) 243 CLR 319, (‘Plaintiff M61’). By way of contrast, English case law has moved decisively to the position of
courts and tribunals are concerned that decision-makers ought not to look as though their decisions are made arbitrarily, this would be an important step, since failing to adhere to soft law issued by the public authority in which a decision-maker works looks very arbitrary indeed. The question then becomes in what way courts are able to enforce consideration of soft law.

The rule against fettering is not a demanding ground of review, even on decision-makers in high-volume areas of government. All that it requires is that a decision-maker have regard to the merits of each individual case rather than to apply a soft law exegesis of his or her statutory discretion mechanically. As Deane J has noted, while consistency in decision-making is generally desirable, it is an ingredient rather than a hallmark of justice. Where a statutory discretion is the subject of soft law, exercises of that discretion will largely be consistent with each other. The rule against fettering requires no more than that the elegance of this consistency be put aside where justice so demands.

This principle does not provide any protection to the party whose concern is that a public authority has not adhered to a soft law instrument in exercising a discretion. Aside from circumstances creating an obligation to provide procedural fairness before the terms of a soft law instrument are departed from, the existence of soft law is all but legally irrelevant. The suggestion from Aronson and Groves above that courts ‘explore the possibilities of giving more force to non-statutory guidelines’ is interesting in as much as it foreshadows the possibility that soft law may be required to adhere to the presumption that it either applies symmetrically or not at all. Once one recognises exceptions to the prohibition of fettering, then there is room for consistency to operate as more than just a procedural restraint.

It is unclear exactly how a court would bring about this end. To the extent that inconsistency already has a place in judicial review, it is as an aspect of Wednesbury unreasonableness, although that fact is inseparable from the consequence that it is very rarely argued with success. Another way of giving greater substance to soft law may be to interpret each soft law instrument as containing an implied undertaking that

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85 Nevistic v Minister for Immigration and Ethnic Affairs (1981) 51 FLR 325, 334 (Deane J) ('Nevistic v MIEA'). See also Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409, 420–1 (Bowen CJ & Deane J) ('Drake’s Case').
86 Drake (No.2) (1979) 2 ALD 634, 639 (Brennan J).
87 Where the relevant body is not ‘public’ in the relevant sense, an applicant may struggle to prove that the matter is justiciable in the first place; see Cameron v Hogan (1934) 51 CLR 358; Jackson v Bitar [2011] VSC 11.
88 Craig, above n 24, 545–7.
89 See, eg, Sunshine Coast Broadcasters Ltd v Duncan (1988) 83 ALR 121, 131–2 (Pincus J) ('Sunshine Coast Broadcasters').
90 The Wednesbury standard has traditionally applied in Australia only to the most absurd exercises of discretion, although the High Court signalled that it would apply a more relaxed version of the Wednesbury ground in future in Minister for Immigration and Citizenship v Xiujuan Li (2013) 87 ALJR 618.
the public authority which issued it undertakes to be bound by its terms unless or until the instrument is terminated. Yet another may be to give no evidentiary weight to any soft law instrument which does not apply symmetrically. What is clear is that it is difficult to create a solution in legal terms where the very potency of soft law comes from the fact that it is treated by so many individuals as having legal effect although it does not. It may be that the best response simply does not lie within the purview of the courts.\footnote{See McMillan, above n 47. This possibility will be examined in Part IV.}

B \hspace{1em} Mandatory relevant considerations

The weight of case law suggests that the most likely option for courts which wish to enforce consideration of soft law is for them to view it, in some circumstances, as a mandatory relevant consideration. Review for failing to take into account a mandatory relevant consideration was examined by the Full Federal Court in \textit{Khan v Minister for Immigration and Citizenship}.\footnote{McMillan, above n 47.} Mr Khan was a Bangladeshi citizen who arrived in Australia on a student visa and was subsequently sponsored for a Business (Long Stay) visa of four years' duration by his employer at an Indian restaurant. A manager employed by Mr Khan's employer wrote to the Department of Immigration and Citizenship (DIAC) and alleged that Mr Khan had engaged in 'fraudulent behaviour' which would disentitle him from holding a visa. The manager requested that DIAC cancel his employer's sponsorship of Mr Khan and that DIAC not reveal to Mr Khan that the manager had made any allegations against him. About a month later, DIAC wrote to Mr Khan to inform him that DIAC was considering the cancellation of his visa and that '[t]he grounds for cancellation of your visa appear to exist because the Department received advice from your sponsor ... indicating that you had ceased employment...'.\footnote{Ibid 173 ('Khan v MIAC').}

A delegate of the Minister informed Mr Khan that his visa had been cancelled because he had ceased to be employed by his sponsor.\footnote{The manager had advised DIAC that Mr Khan had ceased employment as a result of the allegations set out in his letter to DIAC, although the Full Federal Court inferred that Mr Khan was informed of that fact by neither DIAC nor his employer: Ibid 176 [7] (Buchanan J).} The Migration Review Tribunal (MRT) affirmed the delegate's decision but noted (contrary to the implication contained in the delegate's reasons for decision) that it was not mandatory for Mr Khan's visa to be cancelled. Rather, the remit of the MRT was to consider whether or not to cancel Mr Khan's visa 'considering the circumstances as a whole'.\footnote{Buchanan J noted that 'Mr Khan was misinformed about the nature (and impliedly the content) of the advice received by [DIAC]. ... There was no mention in the delegate's decision of the accusations made against Mr Khan by the manager.': Ibid 177 [11] (Buchanan J).} The relevant circumstances were, in part, defined by DIAC's 'Procedures Advice Manual' (Manual), which set out guidelines to assist DIAC officers in assessing visa applications. Flick J
noted that the Manual is ‘available to at least some migration agents’.96 The Manual listed several matters relevant to the cancellation of Mr Khan’s visa.97

Mr Khan’s appeal on the merits was unsuccessful before the MRT. That decision was upheld by the Federal Magistrates’ Court, but the Full Court of the Federal Court upheld Mr Khan’s appeal. Buchanan J stated that, if the MRT had not ‘given sufficient (or any) attention to matters which bore directly upon the exercise of its discretion’98 to cancel Mr Khan’s visa, it would have fallen into jurisdictional error. The statutory discretion to cancel Mr Khan’s visa was not mandatory unless there existed ‘circumstances in which a visa must be cancelled’99 as prescribed in the Migration Regulations. The MRT found that there were no such prescribed circumstances.100 Nonetheless, Buchanan J (with the agreement of Flick and Yates JJ) held, and counsel for the Minister had conceded at the appellate hearing,101 that the MRT was ‘bound to consider’ the ‘circumstances in which the ground for cancellation arose (for example, whether extenuating or compassionate circumstances outweigh the grounds for cancelling the visa)’.102 This was a matter listed as relevant in the Manual but it did not bear the status of a mandatory matter which had been prescribed in subordinate legislation.

I take no issue with the finding of Buchanan J that the ‘circumstances in which the ground for cancellation arose’ have an entirely different import from the matters which explain the MRT’s decision.103 There is no doubt that the MRT failed to review the matter whose relevance was indicated by the Manual, namely why Mr Khan was no longer employed by his sponsor rather than the mere fact that he was not. This reasoning certainly supports Buchanan J’s earlier finding that procedural fairness demanded that the existence and contents of the manager’s letters be revealed to Mr Khan. However, it does not establish that the manager’s letters and the reasons for which they reveal that Mr Khan lost his job were considerations that were mandatory for the MRT to take into account; nor does the fact that these documents were evidently viewed as ‘relevant’ by DIAC.104

The ‘relevancy grounds’105 of review do not require that a decision-maker consider every matter which is objectively relevant to his or her decision. Rather, jurisdictional error results when a decision-maker ‘disregards … some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account … as a pre-condition of the existence of any authority to make [a] … decision in the circumstances of the particular case’.106 This is a point that has been made repeatedly by the High Court, most notably

96 Ibid 191 [71] (Flick J).
98 Ibid 189 [57] (Buchanan J).
99 Migration Act 1958 (Cth) s 116(3). The Migration Regulations are delegated legislation made under the authority of the Migration Act 1958 (Cth).
100 Khan v MIAAC (2011) 192 FCR 173, 189 [59] (Buchanan J).
101 Ibid 189 [61] (Buchanan J); 191 [75] (Flick J).
102 Ibid 189-90 [60]-[61] (Buchanan J); 192-3 [71] (Flick J).
103 Ibid 189-90 [61] (Buchanan J).
104 Ibid 190 [62] (Buchanan J).
105 Aronson and Groves, above n 42, 274.
by Mason J in Minister for Aboriginal Affairs v Peko-Wallsend Ltd 162 CLR 24,107 although there is nonetheless frequent slippage between what is mandatory and what is merely relevant.

Whether or not a decision-maker is bound to take a certain matter into account is a matter of statutory construction and most legislation is properly construed as requiring very few things from those on whom they confer a power or discretion.108 The relevant section of the Migration Act 1985 (Cth) in Khan v MIAC certainly cannot be read as requiring the decision-maker to take account of the terms of the Manual. The better view, as put by Flick J, was that when ‘exercising the discretionary power conferred by [statute], the delegate and the [MRT] were entitled to take into account government policy and such other matters as are set forth in the Manual’.109

Flick J’s analysis of this issue modified that of Buchanan J.110 His Honour cited Mason J’s judgment in Peko-Wallsend to the effect that the matters which a decision-maker is bound to take into account ‘remain to be determined by reference to the objects and purposes’111 of the legislation which confers power on the decision-maker. Flick J used this reasoning to take the position that the requirement to look to the circumstances in which the cancellation arose was sourced to the Migration Act 1985 (Cth), rather than to the Manual.112 His Honour read the statute to require a consideration of the circumstances in which cancellation arose on the basis that one can’t consider whether the visa conditions no longer exist unless one first considers whether those conditions had ceased to exist at the time of cancellation. If cancellation was wrong at the time, then the visa should be restored (and perhaps re-cancelled if the conditions subsequently cease to exist). Flick J reached this conclusion regardless of the Manual and stated that:

Whether or not the Manual identifies considerations going beyond those that must be taken into account when making a decision under [the relevant section of the Migration Act],

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107 ‘The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision’: Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 39 (original emphasis) (‘Peko-Wallsend’).

108 Aronson and Groves, above n 42, 275.


110 Ibid 192 [74] (Flick J). The relevant passage from Peko-Wallsend states that ‘where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.’: Peko-Wallsend (1986) 162 CLR 24, 39-40 (Mason J) (emphasis added).

111 Flick J further commented that ‘as acknowledged in the Manual, the “circumstances in which the ground for cancellation arose” should have been expressly addressed by both the delegate and the [MRT]. Irrespective of the Manual, those circumstances were in any event considerations that had to be taken into account when exercising the power conferred by s 116.’: Khan v MIAC (2011) 192 FCR 173, 194-5 [82] (Flick J).
those considerations which must be taken into account when making such a decision include ‘the circumstances in which the ground for cancellation arose’. 113

In his concluding remarks, Flick J indicated that such issues as exist with the failure of decision-makers to adhere to the terms of the Manual remain to be argued another day. He did, however, remark that ‘the Manual may nevertheless be taken as a formal guide as to how the power conferred by [the Migration Act] is to be administered as a matter of practice’. 114 This is a remarkable statement, referring as it does to the Manual as a ‘formal’ guide and leaving open the question of whether a failure to apply the terms of the Manual consistently with other similar decisions opens a ground of judicial review. This steps away from the orthodoxy of the position in Peko-Wallsend to recognise, as the High Court did in Plaintiff M61, that soft law (particularly at this level of sophistication) must mean something. It is unnecessary to determine whether the Manual's terms are mandatory considerations (whether because they are sourced directly from the Migration Act itself or are sourced to procedural fairness obligations). A public authority cannot depart from a 'promise' of the sort contained in the Manual without first providing a warning, 115 and if a warning is needed, it follows that the authority's decision-maker has to think about it and therefore consideration must be given to the terms of the Manual.

The High Court in Peko-Wallsend extended the process of statutory interpretation involved in determining issues which it was mandatory for the decision-maker to consider beyond the express terms of the relevant statute to implications which could justifiably be drawn from them. 116 There is no reason why Peko-Wallsend's logic cannot be applied symmetrically. If there is a requirement on a decision-maker to consider the case that an applicant brings to the table, why oughtn't the decision-maker also be required to take account of what s/he brings to the table (such as any applicable soft law)?

The recognition that mandatory considerations need not be sourced to instruments with binding force 117 has not hitherto formed a basis by which a court could hold a consideration contained only in soft law and not otherwise able to be implied from the terms of the governing legislation to be mandatory, and therefore failure to consider it a jurisdictional error. 118 However, courts have been prepared to view non-regard or misconstruction of soft law as judicially reviewable on the basis that the decision-

113 Ibid 193 [75] (Flick J) (emphasis added).
114 Ibid 195 [84] (Flick J).
115 Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1 (‘Lam’).
117 Subsequent to the High Court's decision in Peko-Wallsend, Davies J stated that 'even if non-statutory rules do not, of themselves, have binding effect, the failure of a decision-maker to have regard to them or his failure to interpret them correctly may amount to an error of law justifying an order of judicial review.' Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce (1987) 17 FCR 1, 15 (Davies J) (‘Gerah Imports’).
118 It is beyond the scope of this article to attempt to unravel the Australian jurisprudence on whether a decision-maker empowered by statute is obliged to give effect to Ministerial policies or directions. See the conflicting judgments in R v Anderson; Ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177 (‘Ipec-Air’); Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth (1977) 139 CLR 54 (‘Ansett’).
maker has failed to take account of a mandatory relevant consideration,\(^{119}\) This may particularly be so where there is an available inference that a discretion is to be guided by soft law,\(^{120}\) either as a matter of statutory interpretation or, in the words of French J, by evidence of a ‘commitment on the part of the [decision-maker] to a particular approach to the law in those cases to which [the relevant soft law] applies … [which] will necessarily be qualified by the extent to which the [soft law] itself embodies qualifications and conditions in its own terms.’\(^{121}\) Such a commitment must, of course, fall short of estoppel\(^{122}\) or fettering, making it difficult to know exactly what kind of commitment that French J had in mind.

The high-water mark of judicial acceptance that sufficiently serious misconstruction of soft law could amount to jurisdictional error came in Gray.\(^{123}\) In that case, French and Drummond JJ (over a dissenting judgment by Neaves J) stated that Ministerial policy statements regarding deportation of non-citizens convicted of criminal offences ‘were relevant factors which the [decision-maker] was bound to consider although not bound to apply so as to prejudice its independent assessment of the merits of the case.’\(^{124}\) Aronson and Groves have suggested that subsequent Federal Court authority may require that Gray be reconsidered,\(^{125}\) citing the decision of Tracey J in AB.\(^{126}\) In that case, his Honour said that Gray:

> cannot be understood as supporting an unqualified proposition that an error in construing and applying a policy or an unincorporated treaty, which the decision-maker is not bound to apply, will amount to jurisdictional error. This will only be so if the misconstruction is ‘serious’ such that ‘what is applied is not the policy but something

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\(^{119}\) Holden Ltd v Chief Executive Officer of Customs (2005) 141 FCR 571, 583 [38] (RD Nicholson, Weinberg & Selway JJ) (‘Holden v Customs’); cf Minister for Immigration & Ethnic Affairs v Conyngham (1986) 11 FCR 528, (‘Conyngham’).

\(^{120}\) ‘Where the parliament has conferred wide discretions on an official decision-maker, particularly in relation to high volume decision-making, it is entirely consistent with the legislative intention in conferring such a discretion that its exercise will be guided by administrative policies. Indeed, it may be inferred that the creation of such policies is contemplated by the legislature when it confers such discretions.’: BHP Billiton Direct Reduced Iron Pty Ltd v Duffus, Deputy Commissioner of Taxation (2007) 99 ALD 149, 171 [103] (French J) (‘BHP v Duffus’).

\(^{121}\) This is a reference to a previous comment of the Full Federal Court that a public ruling issued by the Federal Commissioner of Taxation ‘operates as if it is the statutory basis upon which tax is to be levied. No question arises as to whether it is or is not relied upon.’: Bellinz and Others v Commissioner of Taxation (1998) 84 FCR 154, 169 (Hill, Sundberg & Goldberg JJ) (‘Bellinz’). See BHP v Duffus (2007) 99 ALD 149, 171 [102].


\(^{123}\) Minister for Immigration, Local Government and Ethnic Affairs v Gray (1994) 50 FCR 189, (‘MILGEA v Gray’).

\(^{124}\) Ibid 211 (emphasis added).

\(^{125}\) Aronson and Groves, above n 42, 158.

\(^{126}\) AB v Minister for Immigration and Citizenship (2007) 96 ALD 53, (Tracey J) (‘AB v MIAC’).
else’. Moreover, their Honours’ reasoning assumes that the tribunal was bound to give consideration to the ministerial policy.\footnote{Ibid 62 [25]. Tracey J was prepared to distinguish MILGEA v Gray in order to find that an international treaty which had not been incorporated into Australian domestic legislation could not form the basis of a mandatory relevant consideration: at 63 [27]. His Honour noted that French J had himself reached the same conclusion in the earlier case of Le v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 875, [61]–[66] (French J) (‘Le v MiMIA’).}

These comments by Tracey J are consistent with what was said by French and Drummond JJ in Gray, although they do draw attention to the fact that it remains unclear what their Honours had in mind when they spoke of a ‘serious’ misconstruction of a policy. It appears that a ‘serious’ misconstruction is one which results in jurisdictional error, although this is unhelpful in as much as it states a conclusion\footnote{See Aronson and Groves, above n 42, 15; Mark Aronson, ‘Jurisdictional Error Without the Tears’ in Groves and Lee (eds), above n 16, 330.} rather than a test by which that conclusion may be reached. This departure from Gray is explicable as relying on the difference between, on one hand, a treaty of which a decision-maker is able but not obliged to take note and, on the other hand, soft law which amounts to a representation, binding on the decision-maker at least to consider, if not to apply. While both the treaty and the soft law are non-statutory, there must be a difference between the many hundreds of treaties to which Australia is party\footnote{Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 316 (McHugh J) (‘Teoh’); Project Blue Sky v Australian Broadcast Authority (1998) 194 CLR 355, 392 [96] (McHugh, Gummow, Kirby & Hayne JJ) (‘Project Blue Sky’).} and policies and guidelines issued by the same public authority which is then to make a decision to which that soft law applies.

The possibilities for giving greater application to soft law by presuming that it amounts to a mandatory relevant consideration may be easier to achieve than would be the case by doing away with the prohibition of fettering. On the other hand, this would be a process which could serve to further increase the confusing flexibility inherent in the doctrine of relevant considerations as an exercise in statutory construction. An (overly) expansive interpretation of what constitutes or can be inferred from the governing statute to be a mandatory consideration has a long history, going back at least to Peko-Wallsend itself, and is notable in the most recent case law.\footnote{The conclusion of the High Court that the appellant Minister was obliged to consider the ‘most recent and accurate information … at hand’ (at 44 per Mason J) made a mockery of the process of public consultation that had preceded the recommendation by the Aboriginal Land Commissioner to the Minister that land be granted to Aborigines since Peko only revealed important information about the location of certain valuable uranium deposits after the Commissioner had reported and had misled the Commissioner (at 34–5 per Mason J): Peko-Wallsend (1986) 162 CLR 24. How can the implied mandatory consideration of the most recent information be reconciled with the statutory powers and duties of the Commissioner when the result is that Peko was allowed to withhold evidence to be presented to the Minister alone? See also Aronson and Groves, above n 42, 279–80.} However, on balance, it is reasonable for the courts to impose a standard requiring that a decision-maker take account of relevant material which impacts on the
C Substantive enforcement of legitimate expectations

The rule against fettering is essentially the inverse of the argument that a person who has a legitimate expectation that a decision-maker will adhere to a policy from which s/he seeks to depart should be entitled to substantive enforcement of that expectation.\(^{132}\) However, the conclusion that judicial review remedies will rarely be available for breach of soft law in Australia is emphasised most clearly by the approach that Australian courts have taken to the concept of substantive enforcement of legitimate expectations which has developed in the UK\(^{133}\) and elsewhere.\(^{134}\)

It is ‘trite law that promises and undertakings can generate obligations to observe the rules of natural justice’\(^ {135}\) although Australian courts will not give substantive effect to legitimate expectations which are created as a result of representations made in soft law instruments. Soft law may create procedural obligations on the part of bodies which use it as a regulatory tool, most obviously where there has been a specific representation that the terms of a soft law instrument will be applied to a particular case. For example, consider a public authority which has the statutory power to grant a licence. Through soft law, it lists a series of requirements which need to be met by every licence application,\(^ {136}\) and states that it will grant a licence to every ‘complying application’. If a person has a complying application, in the sense that s/he has met all the requirements for obtaining a licence which are contained in the soft law instrument, then s/he has at least a legitimate expectation that s/he will be heard before any decision is made not to grant the licence.\(^ {137}\)

In Australia, even the procedural consequences of such a legitimate expectation are quite limited. Lam stands as authority for the proposition that the authority with the power to grant the licence could satisfy the requirements of procedural fairness by

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\(^{134}\) South Africa is an intriguing example. That country’s Constitution specifically promises that administrative action which is procedurally fair: Constitution of the Republic of South Africa 1996 s 33. This promise is effected by the Promotion of Administrative Justice Act 2000 (SA). Furthermore, there is a long-standing recognition of the procedural aspects of legitimate expectations: Administrator of the Transvaal v Traub [1989] 4 All SA 924 (AD), (‘Traub’s Case’). Recently, some courts have attempted to give substantive enforcement to legitimate expectations: Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd 2001 (4) SA 661 (W), (‘Peter Klein Investments’). However, this trend appears to have been halted, at least for the time being, by the decision of the Supreme Court of Appeal in Duncan v Minister of Environmental Affairs and Tourism 2010 (6) SA 374 (SCA) (‘Duncan’s Case’). See generally Cora Hoexter, Administrative Law in South Africa (Juta, 2nd ed, 2012).


\(^{136}\) This amounts to a representation as to how the decision-maker will exercise his or her discretion. See Aronson and Groves, above n 42, 443.

\(^{137}\) Gerah Imports (1987) 17 FCR 1.
either publicly withdrawing the soft law instrument or warning individuals that they ought not to rely on it. Indeed, Gleeson CJ stated explicitly that, in order for a judicial review remedy to be available for breaching the requirements of procedural fairness, ‘what must be demonstrated is unfairness, not merely departure from a representation’.138 This was an opinion in which the rest of the Lam court concurred,139 each identifying the lack of detrimental reliance on the part of Mr Lam as indicating that procedural fairness had been satisfied. In other words, substantive unfairness may be relevant to judicial review in Australian courts, although the remedy is only ever procedural and never substantive. It will not, however, arise merely from the failure to adhere to a stated procedure where the breach was immaterial.140 Mr Lam had suffered a breach of procedural fairness (by not having been warned that the decision-maker no longer proposed to seek comment from the woman who was caring for his children), but it was accepted that he had lost nothing as a result of that breach because she had already given her statement to the authorities and would not have said anything different or new if they had approached her again. Common law judicial review does not require that remedies be provided where to do so would be futile.141 This is to be contrasted to the situation where the content of the procedural fairness hearing rule is determined entirely by statute.142

Lam has had the effect of inhibiting the use to which the concept of legitimate expectations can be put in Australian judicial review. However, judicial review of representations or policy statements made by public authorities need not rely on that concept.143 One case in which a public authority was held to soft law guidelines was Applicants M16 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs.144 In that case, Gray J considered ‘gender guidelines’ (draft guidelines issued by the respondent Minister for dealing with gender-related claims by asylum seekers)145 and found a want of procedural fairness in the failure of the Refugee Review Tribunal to apply them in the case of a female Tamil asylum-seeker from Sri Lanka who had suffered a brutal assault while pregnant.146 She had indicated unequivocally that she

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138 Lam (2003) 214 CLR 1, 12 [34] (Gleeson CJ).
139 Ibid 34 [105] (McHugh & Gummow JJ); 35–6 [111] (Hayne J); 48–9 [149]–[151] (Callinan J).
140 Gleeson CJ did state expressly that the ‘content of the requirements of fairness may be affected by what is said or done during the process of decision-making, and by developments in the course of that process, including representations made as to the procedure to be followed’: Lam (2003) 214 CLR 1, 12 [34].
143 As in Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1, (‘NAFF v MIMIA’).
144 Stewart v Deputy Commissioner of Taxation [2011] FCA 336, [29].
145 Darling Casino Ltd v NSW Casino Control Authority (1997) 191 CLR 602, 609 (Brennan CJ, Dawson & Toohey JJ) (‘Darling Casino’). See Aronson and Groves, above n 42, 441.
146 (2005) 148 FCR 46, (Gray J) (‘Applicants M16’).
147 See Khawar v Minister for Immigration and Multicultural Affairs (1999) 168 ALR 190, 199 [38] (Branson J) (‘Khawar v MIMA’).
was prepared to discuss these aspects of her case only with a female case officer. The gender guidelines had been put in place in order to ensure a ‘sensitive and fair process’ for persons who claimed refugee status based on ‘gender-related claims’ and recognised the specific difficulties faced by female asylum-seekers, particularly those who had been subjected to sexual violence. Gray J hinted that the procedural safeguards implemented by the gender guidelines may in any case have been required as a matter of common law since:

'[t]he willingness, and often the very ability, of people to talk about their experiences are affected by what are described as 'gender issues', and by cultural norms. This is now so well understood that it hardly seems necessary to state it."

The gender guidelines supplemented the hearing rule of procedural fairness by establishing appropriate procedures for women to argue their claims for refugee status in circumstances where they may face ‘social and cultural barriers’ to articulating the details of those claims. The failure of the RRT to follow the gender guidelines was a breach of the requirements of procedural fairness only in as much as it resulted in the RRT failing to give the first applicant a proper hearing. This is to say that the gender guidelines did not assume the status of a hard legal requirement. They merely indicated what steps needed to be taken to lead to a procedurally fair outcome. In circumstances where Gray J was not prepared to accept that, as the High Court had in Lam, the breach of procedural fairness had had no substantive effect, the RRT was obliged to follow the gender guidelines unless it had previously warned the first applicant that it would not do so.

III PRIVATE LAW REMEDIES

As we have seen, in Australia judicial review is limited in its capacity to provide a remedy where an individual wishes to enforce the terms of a soft law instrument and is opposed by a public authority. However, there are limited circumstances in which an individual in those circumstances may be able to obtain a private law remedy, either in damages for negligent misrepresentation or in equitable compensation.

A Negligence

In Australia, statutory reform long ago abolished the approach of the common law which held that government bodies were immune from suit. The relevant statutory

149 Ibid 51 [15]. Ultimately, the court did not decide whether there had been a breach of procedural fairness by the Minister’s delegate, noting that such a breach could in any event have been cured before the RRT: at 58 [46].
150 Ibid 56 [37].
151 Ibid 56 [35].
152 See also Stewart v Deputy Commissioner of Taxation [2011] FCA 336, [48]; cf R (BAPIO Action Limited) v Secretary of State for the Home Department [2008] 1 AC 1003 (‘BAPIO Action’).
153 Applicants M16 (2005) 148 FCR 46, 60 [52].
154 This would be most unlikely in circumstances where the gender guidelines were issued by the Minister: Drake (No 2) (1979) 2 ALD 634.
provisions are still in force,\textsuperscript{157} generally in terms consistent with the Commonwealth
Judiciary Act 1903, which reads at s 64:

In any suit to which the Commonwealth or a State is a party, the rights of parties shall \textit{as nearly as possible be the same}, and judgment may be given and costs awarded on either
side, as in a suit between subject and subject.\textsuperscript{158}

The qualification ‘as nearly as possible’ recognises implicitly that governments
cannot be dealt with on \textit{exactly} the ‘same’ basis as private individuals and that their
responsibilities \textit{do} make them different to individuals in some important senses. As
Gleeson CJ noted in \textit{Graham Barclay Oysters}, the qualification ‘as nearly as possible’\textsuperscript{159}
is an ‘aspiration’ that cannot be realised completely.\textsuperscript{160} While this principle alone will
not prevent a duty of care being inferred in circumstances where soft law issued by a
public authority induces an individual to act to his or her detriment, courts are
generally reluctant to require more of public authorities as a result of their public
status than would be required of private actors.

Liability in negligence arises only where a court is able to infer at common law that
a defendant owed the plaintiff a duty of care and the plaintiff is able to prove that s/he
has suffered damage which was caused by the defendant’s breach of that duty of

\begin{footnotes}
\item[156] Although, Jaffe noted that ‘the expression “the King can do no wrong” originally meant
precisely the contrary to what it later came to mean. “[I]t meant that the king must not, was
not allowed, not entitled, to do wrong …”: Louis L Jaffe, ‘Suits against Governments and
This was misinterpreted by common law courts for many years, see, eg, \textit{Tobin v The Queen}
(1864) 16 CB (NS) 310; \textit{Feather v The Queen} (1865) 6 B&H 257. That misinterpretation is now
\item[157] The current State and Territory legislation is: \textit{Crown Suits Act 1947} (WA); \textit{Crown Proceedings
(Tas); \textit{Crown Proceedings Act 1993} (NT).
\item[158] \textit{Judiciary Act 1903} (Cth) s 64 (emphasis added). The form of the qualification ‘as nearly as
possible’ is not precisely consistent across every Australian jurisdiction. The NSW,
Queensland and Victorian legislation each uses the words ‘as nearly as possible’, as does s
64 of the \textit{Judiciary Act}, but these words are not found in the relevant sections of the
legislation in the other Australian jurisdictions. See generally Susan Kneebone, ‘Claims
Against the Commonwealth and States and Their Instrumentalities in Federal Jurisdiction:
Section 64 of the \textit{Judiciary Act}’ (1996) 24(1) \textit{Federal Law Review} 93; Bradley Selway, ‘The
Source and Nature of the Liability in Tort of Australian Governments’ (2002) 10 \textit{Tort Law
\item[159] His Honour was discussing the NSW legislation: \textit{Crown Proceedings Act 1988} (NSW) s 5.
\item[160] ‘That formula reflects an aspiration to equality before the law, embracing governments and
citizens, and also a recognition that perfect equality is not attainable. Although the first
principle is that the tortious liability of governments is, as completely as possible,
assembled to that of citizens, there are limits to the extent to which that is possible. They
arise from the nature and responsibilities of governments. In determining the existence and
content of a duty of care, there are differences between the concerns and obligations of
governments, and those of citizens.’: \textit{Graham Barclay Oysters Pty Ltd v Ryan} (2002) 211 CLR
540, 556 (citation omitted) (‘\textit{Graham Barclay Oysters}’).
\end{footnotes}
A statutory grant of power for a public authority to do something does not necessarily translate to a common law duty to do that thing, even though public authorities are generally granted powers with the expectation that they will act for the benefit of society or certain sections of society. In Stuart, Crennan and Kiefel JJ commenced their analysis with the proposition that more can rightly be expected of public authorities where they have a capacity to prevent harm which is not possessed by individuals. This approach was not, however, adopted by the rest of the court.

The potential relevance of a positive duty to act on the part of a public authority can be demonstrated using the well-worn example of East Suffolk Rivers Catchment Board v Kent. The plaintiff suffered flooding to his land as the result of a breach in a sea wall. This was not as a result of any negligent act by the respondent authority. Rather, Mr Kent sought compensation from the defendant because it had exercised its statutory powers to repair the wall in such an inefficient manner that Mr Kent's farm land remained flooded for longer than it would have done if the Board had exercised its powers with due care and skill. Robert Stevens categorises this as nothing more than a failure of the Board to confer a benefit to which Mr Kent had no enforceable right. This reasoning would be incontestable if the party who failed to confer the benefit of repairing the sea wall was Mr Kent's neighbour.

If we assume, however, that repairing sea walls was a substantial purpose of the defendant Board and that the plaintiff either elected not to take action to help himself or was unable to do so, then the Board's failure to prosecute its statutory purpose with reasonable skill and expedition breaches, at the very least, a moral duty on the part of the Board, even if it cannot create a common law duty of care per se. The absence of an enforceable right to the benefit which it was the purpose of the Board to confer does not on its own provide a satisfactory basis for denying the existence of such a duty of care.

Australian law accepts that public authorities may sometimes owe a greater duty than would be owed by a private actor due to a superior capacity to prevent harm.

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163 East Suffolk River Catchment Board v Kent [1941] AC 74 (‘East Suffolk v Kent’).
165 In any event, it is an accurate statement of the law relating to public authorities in the UK following Stovin v Wise [1996] AC 923 (‘Stovin’).
166 I use ‘reasonable’ in its negligence law sense, rather than the public law sense of Wednesbury unreasonableness. The relevance of the latter standard in tort law is discussed in Elizabeth Carroll, Wednesbury unreasonableness as a limit on the civil liability of public authorities’ (2007) 15(2) Tort Law Review 77; Aronson, above n 135, 44; Greg Weeks, ‘A Marriage of Strangers: the Wednesbury Standard in Tort Law’ (2010) 7(8) Macquarie Journal of Business Law 131. In this regard, the ramifications of the High Court’s judgment in Minister for Immigration and Citizenship v Xiujuan Li (2013) 87 ALJR 618 are uncertain.
The question becomes, therefore, whether the proposition, articulated by Mason J in *Council of the Shire of Sutherland v Heyman*168, ‘that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty’169 can be extended to cover soft law obligations in addition to statutory powers and duties. A soft law instrument which is designed to guide the discretion granted to public officers by statute may be different in this regard from a soft law instrument aimed at regulating the behaviour of a *private* party, which takes its character as ‘law’ from its regulatory purpose or effect. However, Australian law has not yet provided an example of an occasion on which a court will compel a public authority to exercise its statutory powers for the benefit of individuals and this potential remedy therefore remains for now in the realm of theory.

Rather than leading to a finding of liability for negligent nonfeasance, it is more likely that a soft law instrument which is published may amount to a negligent misrepresentation if the authority which published it decides to act inconsistently with the instrument. Contrary to the law as regards a duty of care to take positive action, which may be owed to a complete stranger, the relationship between the parties is an essential part of establishing that a representation has been negligently made. The House of Lords referred to the requisite ‘special relationship’ in general terms in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.170 In *Mutual Life and Citizens’ Assurance Co Ltd v Evatt*, Barwick CJ considered ‘the features of the special relationship in which the law will import a duty of care in utterance by way of information or advice’ to include ‘the subject matter of the information or advice being of a serious or business nature’ where the speaker realises ‘that the recipient intends to act upon the information or advice’ and in circumstances ‘such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker’.171 A majority of the

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168 Ibid 458 (Mason J). See also at 467–8 (Mason J). Note that the plaintiff in *Heyman* was unsuccessful in establishing a common law duty of care on the part of the Council on either basis, and also that the existence of a statutory power or duty *per se* is insufficient to create a common law duty of care.

169 [1964] AC 465, 486 (Lord Reid); 502–3 (Lord Morris); 514 (Lord Hodson); 528–9 (Lord Devlin); 539 (Lord Pearce) (*Hedley Byrne*). See also *Mutual Life & Citizens’ Assurance Co Ltd v Evatt* (1968) 122 CLR 556, 621 (Owen J) (*MLC v Evatt*).

170 *MLC v Evatt* 571. The decision of the High Court was overturned by a bare majority in the Privy Council: *Mutual Life & Citizens’ Assurance Co Ltd v Evatt* (1970) 122 CLR 628, (*MLC v Evatt (PC)*). The High Court was no longer bound by the Privy Council’s decision when it later heard *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225, (*Shaddock*). In that case, Mason J, with whom Aickin J agreed, expressly stated that the reasons of Barwick J should be preferred to the speech of Lord Diplock for the majority in the Privy Council: *Shaddock* (1981) 150 CLR 225, 251. Gibbs CJ and Stephen J, by contrast, distinguished the Privy Council’s decision but specifically declined to overturn it. Murphy J delivered a brief judgment in which he stated that ‘there is no justification for adhering to the error expressed by the Privy Council’ but did not specifically approve the approach which had been taken by Barwick J in the High Court: *Shaddock* (1981) 150 CLR 225, 256. The head note to *Shaddock* in the Commonwealth Law Reports notes only that the Privy Council’s decision was ‘considered’: *Shaddock* (1981) 150 CLR 225, 226. However, the
High Court in *San Sebastian* later commented that ‘there is no convincing reason for confining the liability to instances of negligent misstatement made by way of response to a request by the plaintiff for information or advice’.

It will not be reasonable to rely on a representation which, in effect, contains its own inbuilt warning that it ought not to be relied upon. Some types of communication from public bodies (for example, published rulings by the Australian Tax Office) are designed to provide the public at large with comfort that they will be treated in a certain way if they act within the terms of the ruling. Encouragement of reliance is the very purpose for which they are issued. Other communications, for example *ad hoc* approvals of a proposed course of action, necessarily carry the implication that they are given with the proviso that they can be retracted if there is a change in policy. Some types of ‘assurance’ necessarily come with the unspoken warning that reliance is at the risk of the reliant party. One way to determine reasonable reliance is therefore to ask whether the representation upon which a plaintiff has relied was intended to communicate that the public authority making the representation would bear the risk of that representation being incorrect.

Additionally, there is a significant difference (albeit one which may not always be easy to discern) between a statement of policy directed at future conduct — which is naturally always subject to alteration unless its maker is legally bound to it — and a soft law instrument which records an undertaking as to how a public authority will exercise its discretion in current matters.

The nature of the communication in which a representation is made will also have practical importance in ascertaining whether it is reasonable to rely upon it. The extent to which the representation, rather than its purpose, is ‘public’, is therefore a guide to whether a representation can be reasonably relied upon. While a direct and personal oral representation by an unknown employee of a public authority will not necessarily be reliable, a direct written representation on behalf of that authority is more likely to be so.

Reliance on a representation made to and passed on by a third party is less likely to be reasonable than reliance on a direct communication, although...
communicating a representation indirectly will not necessarily preclude a duty of care from being owed in relation to that representation. In these circumstances, the purpose of the representation is likely to be decisive. On the other hand, a statement of future policy made to the world at large, either by a public authority or a Minister of State will necessarily be less reliable, because it is generally ‘understood that a public authority is free to alter a policy unless the policy is given binding effect by statute or by contract’.

Soft law is of a different order to a mere representation, since it regulates behaviour in a manner that has the practical effect of law but is able to be made without the oversight and inconvenience that is required to pass legislation or even subordinate legislation. Whether an instrument amounts to soft law by having a regulatory purpose or effect, and is therefore more than a mere representation, can be assessed by analogy to the reasoning which courts use to determine whether a decision is ‘of an administrative character’ for the purposes of the ADJR Act or ‘of a legislative character’ for the purposes of the Legislative Instruments Act 2003 (Cth). This is not an exact science: as the Full Federal Court noted in RG Capital Radio Ltd v Australian Broadcasting Authority, ‘there is no simple rule for determining whether a decision is of an administrative or a legislative character’.

If a plaintiff were able to establish that a soft law instrument made an unqualified representation that the issuing authority would always follow a certain course of action, his or her reliance on that representation (if established) would likely be viewed as reasonable, subject to the instrument meeting the criteria set down by Barwick CJ in MLC v Evatt. This, however, is more difficult than it may appear. A planning instrument with statutory force and its various supporting documents were alleged in San Sebastian to have induced in the plaintiff an ‘expectation of being allowed to develop in accordance with the proposals’. The majority of the High Court held that no representation had been made by making these documents available. Similarly, in Unilan Holdings Pty Ltd v Kerin, the plaintiff alleged that it

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177 Ibid 15 (Gleeson CJ, Gummow & Hayne JJ).
180 San Sebastian (1986) 162CLR 340, 374 (Brennan J). A similar view was expressed in that case by the plurality: San Sebastian (1986) 162 CLR 340, 360 (Gibbs CJ, Mason, Wilson & Dawson JJ). In San Sebastian, the Court did not express this in terms of the policy / operational distinction used in Anns v Merton Borough Council [1978] AC 728 (and later in Heyman) because the same work can be done by the existing concept that a misrepresentation is not actionable in negligence unless the plaintiff’s reliance upon it is reasonable.
181 ADJR Act s 3(1).
182 Legislative Instruments Act 2003 (Cth) s 5(1)(a).
183 (2001) 113 FCR 185 (‘RG Capital Radio’).
184 Ibid 194 [40].
185 A disclaimer will usually be effective to eliminate liability for negligent misrepresentations: Hedley Byrne [1964] AC 465.
187 San Sebastian (1986) 162 CLR 340, 359. Brennan J, by contrast, did not address the issue of whether the alleged representation had in fact been made. Rather, his Honour held that if a representation was made at all, it was merely implied from the fact that the instrument and supporting documents were said to have been ‘expertly prepared’. This was too ‘limited’ a
had lost money consequent on relying on a statement by the defendant Minister for Primary Industry and Energy at a conference held in Dubrovnik about the future ‘floor price’ of Australian wool. Lockhart J noted that:

Persons in the wool industry who heard statements of the respondent were not entitled, in my opinion, to treat the statement as an absolute and unconditional guarantee and trade on the basis that if they made profits they would belong to them, but if they made losses they would be borne by the respondent or the Australian Government. 189

In short, the case law indicates that not every statement of future intention which does in fact induce another party to act in reliance on the statement’s accuracy is sufficient to ground a duty of care. Cases in which reasonable reliance has been established tend to feature a direct and personal communication of the relevant representation to the reliant party. This is not the usual mode of soft law.

B Equity

Like tort law, equity provides limited scope for enforcing soft law. As I have already discussed, a public authority cannot fetter itself in respect of its future exercise of statutory powers and duties as a matter of public law;190 nor can one obtain relief by way of enforcing an estoppel against a public authority where to do so would cause the authority to act ultra vires191 or would require the future exercise of a statutory discretion to be fettered.192

However, there is a distinction which must be drawn between the equity which is raised where the conditions giving rise to an equitable estoppel are satisfied and the relief which a court will grant to fulfill the equity thus created. As I have argued elsewhere,193 the mere fact that relief by way of enforcing an estoppel is inapt to be granted against a public authority where to do so would cause the authority to act ultra vires or would require the future exercise of a statutory discretion to be fettered does not prevent a court from fulfilling the equity with an award of monetary compensation.194 A public authority being estopped from denying a ‘certain state of affairs’195 at common law is different to holding a public authority to a representation that it will act in future in a certain way if such action would be ultra vires. The capacity of courts with equitable jurisdiction to ‘mould’ a decree to satisfy the minimum

representation to ground a duty of care to the appellants: San Sebastian (1986) 162 CLR 340, 373 (Brennan J).

188 (Unreported, Federal Court of Australia, Lockhart J, 5 February 1993).

189 Ibid. This is the reason why s 52 of the Trade Practices Act 1974 (Cth) (now s 18 of The Australian Consumer Law, which is in Schedule 2 to the Competition and Consumer Act 2010 (Cth)) has always been pleaded so frequently in commercial litigation: in most business contexts, it completely supersedes the effect of Hedley Byrne [1964] AC 465.

190 See, eg, Green v Daniels (1977) 13 ALR 1.


194 Ibid 166.
equity\textsuperscript{196} required to do justice between the parties means that those courts can provide a remedy, such as equitable compensation, even where it is impossible to hold the relevant public authority to its initial representation.

The development of the equitable doctrine of estoppel in Australia over the past three decades\textsuperscript{197} has broadened the scope of equity to provide a remedy in circumstances where damages in negligence would not necessarily lie. The increased coverage of equity means that, in relation to representations made by public authorities, equitable compensation may be available in circumstances where a duty of care is not owed. Notwithstanding this possibility, situations in which equity can provide a remedy where none is available at law will be exceptions to the general rule. Soft law representations from which a public authority seeks to depart will frequently see the grounds for a remedy to be made available satisfied both in equity and at law, although equity's remedies will only be applied where those available at law are insufficient. In response to the proposition that there is no need to stretch equity to provide a monetary remedy,\textsuperscript{198} I therefore argue that it is anomalous for behaviour which both breaches a duty of care and creates an equity to be remediable in tort but not in equity merely because substantive effect cannot be given to an estoppel.

A renewal of the recognition that equity has the capacity to award compensation for breach of an equitable duty would be a significant improvement to the state of the law.\textsuperscript{199} However, it should be understood that compensation is a limited remedy which aims to compensate for the loss caused by not enforcing soft law; it does not give people what they actually wanted in the first place because estoppel is based upon relieving against unconscientious conduct rather than enforcing representations.\textsuperscript{200}

\textsuperscript{196} In Crabb v Arun, Scarman LJ stated that courts ‘have to determine not only the extent of the equity, but also the conditions necessary to satisfy it’: Crabb v Arun District Council [1976] Ch 179; [1975] 3 All ER 865, 880 (‘Crabb v Arun’). The reasoning of Scarman LJ was subsequently approved by a majority of the High Court in Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, 404 (Mason CJ & Wilson J); 425 (Brennan J); 460 (Gaudron J) (‘Waltons v Maher’). However, it received detailed consideration only from Brennan J, who articulated a reliance-based approach to remedying the breach of a legal obligation owed to the representee in circumstances where the conditions for an equitable estoppel are met: Waltons v Maher (1988) 164 CLR 387, 416. Notwithstanding this, Robertson has noted that, in the years immediately following Commonwealth v Verwayen (1990) 170 CLR 394 (‘Verwayen’), courts almost universally satisfied equitable estoppel by granting expectation-based relief: Andrew Robertson, ‘Satisfying the Minimum Equity: Equitable Estoppel Remedies after Verwayen’ (1996) 20 Melbourne University Law Review 805, 829.

\textsuperscript{197} In cases including Waltons v Maher (1988) 164 CLR 387; Foran v Wight (1989) 168 CLR 385; Verwayen (1990) 170 CLR 394., Handley, above n 191.


\textsuperscript{199} I developed in greater detail the argument in favour of revitalising the remedy of equitable compensation in response to an estoppel being raised in Weeks, ‘Estoppel and Public Authorities’, above n 122, 282-6. Likewise, I see no difficulty in an equitable remedy being available in circumstances where liability in negligence cannot be made out; see Weeks, ‘Estoppel and Public Authorities’, above n 122, 273.

Furthermore, equitable compensation will only seldom be an available remedy,\textsuperscript{201} since its coverage is largely similar to that of damages for negligent misrepresentation.\textsuperscript{202} Importantly, though, the coverage of those remedies is not identical. There is no harm in equity extending to cover more ground in circumstances where soft law is being used as a regulatory tool more and more frequently.

\section*{IV \quad NON-JUDICIAL REMEDIES}

It is no great leap, in light of the previous sections of this article, to conclude that judicial remedies for breach of soft law by public authorities are difficult to obtain in Australia. The reason for this is fundamental: soft law may be 'law' in the sense that it constitutes a norm that is usually followed but it is nonetheless 'soft' and as such is not directly enforceable by courts. The judicial remedies described above amount to workarounds rather than indications that judicial remedies are applicable to breaches of soft law generally. Significant changes in established Australian legal doctrine will be required to change this state of affairs.

This is not to say that there is nothing that can be done to remedy loss caused by a public authority’s departure from its own soft law; however, the available remedies are granted by consent rather than as of right. This section will briefly discuss two such remedies: investigation by the Ombudsman and payment of \textit{ex gratia} compensation by the government. The first issue discussed in this section, however, looks not at remedies where soft law has been relied upon but not applied, but at ensuring that soft law is either published or rendered harmless.

\subsection*{A \quad Freedom of information}

As the sections above have showed, soft law is able sometimes to be 'hardened' in Australia. A further example of this point can be observed in the operation of Part II of the Commonwealth \textit{Freedom of Information Act 1982} (Cth) (\textit{FOI Act}).\textsuperscript{203} Prior to amending legislation passed in 2010,\textsuperscript{204} s 9 of the \textit{FOI Act} required government agencies to publish soft law instruments used by them in their internal deliberations. These specifically included 'manuals or other documents containing interpretations, rules, guidelines, practices or precedents'. Following the \textit{Freedom of Information Amendment (Reform) Act 2010} (Cth), Part II is substantially broader in scope,\textsuperscript{205} creating an impetus for agencies to be active in publishing government information. This is consistent with the inclusion in the objects of the \textit{FOI Act} after 2010 of the statement that 'information held by the Government is to be managed for public purposes, and is

\begin{flushleft}
\textsuperscript{201} Query whether it would provide a meaningful remedy in most cases, for example where the failure to provide a benefit under a soft law scheme is wrong under the scheme's terms, but the putative claimant is unable to prove his loss beyond the scope of the thrown away costs of the application.

\textsuperscript{202} One potential area in which it may apply is where the inducement to rely on soft law to the plaintiff's detriment was not the result of negligence but of a deliberate act of an officer of the relevant public authority; see \textit{New South Wales v Lepore} (2003) 212 CLR 511.

\textsuperscript{203} This example is not limited to Australia; see J M Keyes, \textit{Executive Legislation} (2nd ed, 2010) 55.

\textsuperscript{204} \textit{Freedom of Information Amendment (Reform) Act 2010} (Cth).

\textsuperscript{205} See Creyke and McMillan, above n 76, 1018–19.
\end{flushleft}
a national resource’. The Australian Information Commissioner has been active in promoting this new approach to open government, both personally and in his official capacity.

Agencies are required to publish ‘operational information’, which is ‘information held by the agency to assist the agency to perform or exercise the agency’s functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities)’. provided that such information is not already publicly available. Where an agency fails to publish operational information ‘in relation to a function or power of the agency’, and ‘a person engages in conduct relevant to the performance of the function or the exercise of the power’ and was not at that time ‘aware of the unpublished information’, the FOI Act provides a remedy which predates the 2010 reforms:

The person must not be subjected to any prejudice only because of the application to that conduct of any rule, guideline or practice in the unpublished information, if the person could lawfully have avoided that prejudice had he or she been aware of the unpublished information.

This provision does not ‘harden’ soft law in the sense that it becomes binding. Rather, the freedom of information legislation requires that soft law instruments which have a practical effect on the way public bodies make administrative decisions are known to those who may be affected by their content. As the decision of the High Court majority in Tang demonstrated, this does not mean that such persons are able to bind that public body to act consistently with their published guidelines, nor are those guidelines elevated ‘to the status of law’ such that they are enforceable under s 5(1)(b) of the ADJR Act. However, a person may suffer prejudice by an agency’s failure to publish operational information under Part II of the FOI Act. Furthermore,

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206 FOI Act s 3(3).
207 For many years, ‘open government’ had been something of a punchline, on the basis that ‘you can either be open, or have government’ or that government should be open ‘but not gaping’: A Jay and J Lynn, The Complete ‘Yes, Minister’: The Diaries of a Cabinet Minister (HarperCollins, 1988) 27. The changes to Part II introduced by the Freedom of Information Amendment (Reform) Act 2010 (Cth) are intended to secure political and Public Service support for open government in an unprecedented fashion.
210 FOI Act s 8A(1).
211 FOI Act s 10. The relevant legislation in Queensland, NSW and Victoria each features an equivalent provision; see Creyke and McMillan, above n 76, 672-3.
212 In this regard, it cannot be said to have the same effect as Drake (No.2) (1979) 2 ALD 634 has on decisions in the AAT.
215 Ian Duncan v Chief Executive Officer, Centrelink (2008) 244 ALR 129, 135 (Finn J) (‘Duncan v Centrelink’). This would, of course, depend on such a person being able to establish that
the failure to publish information as required under Part II is a ‘decision’ for the purposes of the ADJR Act which would allow an ‘aggrieved person’ to seek redress.\textsuperscript{216}

More generally, the requirement that law must be promulgated before it can be applied adversely to an individual is nothing less than a rule of law principle.\textsuperscript{217} Fuller took the view, writing almost fifty years ago, that this principle should apply to both hard and soft law:\textsuperscript{218}

Deciding agencies, especially administrative tribunals, often take the view that, though the rules they apply to controversies ought to be published, a like requirement does not attach to the rules and practices governing their internal procedures. Yet every experienced attorney knows that to predict the outcome of cases it is often essential to know, not only the formal rules governing them, but the internal procedures of deliberation and consultation by which these rules are in fact applied.

The UK Supreme Court has since applied this reasoning in holding that, by adopting and acting upon a secret policy, the Home Office acted \textit{ultra vires}.\textsuperscript{219} To the extent that the rule of law demands that we be informed in advance of any law which might be applied adversely to us, the FOI Act upholds that principle by severely constraining the results of unpublished information.

\section*{B Ombudsmen}

The office of the Ombudsman is one of Australia’s ‘non-judicial accountability bodies’\textsuperscript{220} and has been described as an element of the ‘integrity branch’ of government.\textsuperscript{221} The institution is Swedish in origin,\textsuperscript{222} but Spigelman CJ has noted they had standing to challenge in court proceedings the failure of the agency to produce its soft law instruments.\textsuperscript{216}

Aronson and Groves, above n 42, 77–8; \textit{Duncan v Centrelink} (2008) 244 ALR 129, 137. In Duncan, Finn J exercised his discretion to deny the applicant declaratory relief, holding that it would provide no ‘real practical consequences’: \textit{Duncan v Centrelink} (2008) 244 ALR 129, 138.

This is a principle which has been recognised for 120 years in England in legislation which requires the publication of every statutory instrument. From 1946, the legislation was expanded to cover the ‘flood tide of rules and regulations which arrived with the welfare state’: HWR Wade and C Forsyth, \textit{Administrative Law} (10th ed, 2009) 760.

\textit{R (Lumba) v Secretary of State for the Home Department; R (Mighty) v Secretary of State for the Home Department} [2012] 1 AC 245, (‘Lumba v Home Secretary’). The policy at issue in this case was not one with which the claimants were able to comply actively, but the application of which merely affected them. This distinction was not considered to be of any consequence to the Supreme Court.

\textsuperscript{216} Aronson and Groves, above n 42, 77–8; \textit{Duncan v Centrelink} (2008) 244 ALR 129, 137. In Duncan, Finn J exercised his discretion to deny the applicant declaratory relief, holding that it would provide no ‘real practical consequences’: \textit{Duncan v Centrelink} (2008) 244 ALR 129, 138.

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\textsuperscript{218} L L Fuller, \textit{The Morality of Law} (Yale University Press, 1964) 50.

\textsuperscript{219} \textit{R (Lumba) v Secretary of State for the Home Department; R (Mighty) v Secretary of State for the Home Department} [2012] 1 AC 245, (‘Lumba v Home Secretary’). The policy at issue in this case was not one with which the claimants were able to comply actively, but the application of which merely affected them. This distinction was not considered to be of any consequence to the Supreme Court.

\textsuperscript{220} McMillan, above n 47, 423. As to the Ombudsman’s Constitutional position in the Australian government framework, see Creyke and McMillan, above n 76, 220–3.


\textsuperscript{222} Creyke and McMillan, above n 76, 202.
that, as a genus, guardians of integrity in government have a strong connection to what Western scholars generally describe — inaccurately — as the ‘censorial’ or ‘supervising’ branch of the Chinese civil service,\(^223\) at least by analogy.\(^224\)

Spigelman CJ did not regard the Ombudsman as a central feature of the integrity branch,\(^225\) in as much as the office’s role was one of complaint handling:

Complaint mechanisms are designed to improve the quality of decision-making and are more in the nature of the performance of an executive function, than an integrity function. Nevertheless, many complaint handling bodies, including Ombudsmen, do perform integrity functions, in the course of, or sometimes in addition to, dealing with individual complaints.\(^226\)

His Honour saw the integrity function as being exercised in the main through judicial review, which has the function of ensuring the legality of the actions of public authorities. By contrast, Professor Stuhmcke has argued that:

[T]he more acute application of ‘integrity review’ in practice is diametrically opposed to the outcomes delivered by an adversarial system of dispute resolution. This is because, in the adversarial system, disputes arise precisely because there is a view by the litigant or complainant that the administrative decision was impaired and imperfect. Integrity review requires the opposite – that there is no originating dispute due to imperfection or incorrect administrative decision-makers. Indeed, effective integrity review means that administrative law will operate to ensure that government agency decision-making is perfect from its inception and that this is an ongoing state of government agency administrative decision-making.\(^227\)

Stuhmcke differentiated the reactive complaint handling role of Australian Ombudsmen from an active ‘system-fixing’ role.\(^228\) While the first of these roles is the traditional focus of the Ombudsman’s office, the latter is assuming an ever greater importance,\(^229\) with Ombudsmen making limited funds go further by commencing more investigations on their own motions and attempting to influence systemic change rather than redress individual grievances.\(^230\) This active investigative function conforms more fully to the notion of integrity review.\(^231\)

The Ombudsman’s system-fixing role is relevant to an analysis of soft law because soft law remains a legally novel method of regulation. The fact that, as I have discussed

\(^{223}\) Spigelman, above n 221, 724.
\(^{224}\) Chief Justice James Spigelman, ‘Judicial Review and the Integrity Branch of Government’ (Speech delivered at the World Jurist Association Congress, Shanghai, 8 September 2005).
\(^{225}\) Cf Stuhmcke, above n 221, 354. Whether or not the Ombudsman is ‘central’ to integrity review, it is certainly ‘a central component of administrative justice’: Harlow and Rawlings, \textit{Law and Administration} (Cambridge University Press, 3rd ed, 2009) 480.
\(^{226}\) Spigelman, above n 221, 729.
\(^{227}\) Stuhmcke, above n 221, 353–4.
\(^{228}\) Ibid 354–6.
\(^{231}\) Stuhmcke, above n 221, 355–6.
above, courts have few current tools for dealing with soft law means that the Ombudsman, and other 'integrity branch' authorities, bear a responsibility for making sure that the steps required ‘to ensure that administrative law values are upheld’ are properly understood. In helping to define the norms in accordance with which activity is regulated, the Ombudsman fills a protective, rather than a remedial, role.

The practical limitations upon the scope of the Ombudsman's complaint-handling work should not distract attention from the fact that the office investigates many thousands of complaints every year and, for each of these complainants, the Ombudsman endeavours to obtain a suitable remedy. Because it is situated outside the judicial branch of government, Australia's Constitutional separation of powers dictates that the Ombudsman's office cannot impose binding declarations of right on the public authorities which it investigates. At least one former Commonwealth Ombudsman does not view the incapacity to provide ‘traditional remedies’ as a problem, since he regards them as:

ill-adapted, for example, to assist a person who is caught by an unintended anomaly in a legislative rule, who has fallen through the cracks of a government program, is confused about the advice received from an agency, is disadvantaged by an agency's delay in addressing a complaint, or is disabled by a physical or mental impairment in understanding or accessing his or her legal rights.

The Ombudsman, on the other hand, is able to assist in situations like these because the role of the office is restricted to recommending a course of action to the relevant public authority and is therefore not restricted to statements of legal right. It is this adaptability that makes the Ombudsman of such potential importance where individuals are adversely affected by applications or failures to apply soft law.

Let us consider again the situation of Ms Tang. While exercises of power by universities are not inevitably of a public nature, there are solid arguments in favour of that position. One is that each jurisdiction's Ombudsman has jurisdiction over university decisions and conduct. In Ms Tang's case, the Ombudsman Act 2001 (Qld) empowered the Queensland Ombudsman to 'investigate administrative actions of

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232 An example is the Administrative Review Council (ARC), which is established under the Administrative Appeals Tribunal Act 1975 (Cth). The ARC has published a report on soft law issues: Administrative Review Council, Complex Regulation Report (2008).

233 McMillan, above n 229, 18.

234 Ibid 14.

235 Professor McMillan defined these as court or tribunal orders which quash erroneous decisions, substitute fresh decisions, restrain unlawful conduct, mandate lawful action or declare the law which is to be applied: McMillan, above n 229, 17.


237 Aronson, above n 9, 14–15.

238 Ibid 14.
agencies', including any entity (other than an individual) established either ‘for a public purpose’ or ‘by government for a public purpose’ under an Act. Griffith University falls within these statutory criteria, and Ms Tang could therefore have complained to the Ombudsman. While this (and like considerations) cannot be conclusive of whether a University’s use of public power is otherwise legally significant, since the High Court of Australia has largely been slow to embrace foreign innovations which have extended the coverage of judicial review’s remedies beyond public bodies to exercises of public power more generally, Ms Tang may have been able to obtain a remedy through the Ombudsman’s influence.

This may have been no more than for the University to observe the requirements of procedural fairness in dealing with the allegations against Ms Tang, since the Ombudsman does not have the jurisdiction to reverse the University’s decision or to impose a decision of its own; indeed, the Ombudsman has no coercive remedial powers at all. However, the Ombudsman’s office is, in practice, highly persuasive and uses the Ombudsman’s stature (and the fact that it is not involved in an adversarial process against administrative agencies) to obtain remedies, which may include ‘an apology, financial compensation, proper explanation, reconsideration of agency action, and expediting agency action’. Clearly, some of these recommendatory remedial options would not work in circumstances where the Ombudsman was empowered only to make determinations.

Given Ms Tang’s essential contention that the University had promised her procedural fairness, through its soft law misconduct code, in coming to any decision to cancel her candidacy for a degree and that it had not fulfilled its promise in this regard, the Ombudsman may well have been of much greater assistance to her than the court could have been. Even if a court had taken a broader view of its capacity to review the University’s decision than the High Court ultimately did, a recommendation from the

239 Ombudsman Act 2001 (Qld) s 6(b)(i). ‘Agencies’ were defined to include public authorities: Ombudsman Act 2001 (Qld) s 8(1)(c).
240 Ombudsman Act 2001 (Qld) s 9(1)(a).
241 It is commonplace for Australian courts to extend judicial review principles, particularly those of procedural fairness, to some private institutions regardless of whether they exercise public power; see, eg, Forbes v New South Wales Trotting Club Ltd (1979) 143 CLR 242; cf Hinkley v Star City Pty Ltd [2010] NSWSC 1389, [114]–[183] (Ward J). This extended coverage does not include judicial review’s remedies: see generally Aronson and Groves, above n 42, 486–9.
242 The High Court has left open ‘the question whether a party identified as “an independent contractor” nevertheless may fall within the expression “an officer of the Commonwealth” in s 75(v) of the Constitution in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been “contracted out”: Plaintiff M61 (2010) 243 CLR 319, 345 [51]. This may suggest that the Court is at least open to the possibility that the jurisdiction under s 75(v) attaches to an exercise of power rather than a certain individual; see Boughy and Weeks, “Officers of the Commonwealth” in the Private Sector: Can the High Court Review Outsourced Exercises of Power? (2013) 36 University of New South Wales Law Journal 316.
244 McMillan, above n 229, 17.
245 Creyke and McMillan, above n 76, 218.
Ombudsman in an non-adversarial setting that the University abide by its promise would have done nothing to alter the substantive decision but would have ensured that it was made consistently with the values and principles of administrative law. Ultimately, this would also have avoided lengthy, expensive and (from Ms Tang's perspective, at least) fruitless litigation.

C  **Ex gratia payments**

One of the recommendations available to the Ombudsman is that a public authority provide financial compensation to an individual who has suffered loss as a result of defective administrative action, such as because the authority failed to adhere to the terms of its soft law, in circumstances where the individual has no enforceable legal right to damages for that loss in judicial proceedings. There are legal limitations on the capacity of government to remedy injustice by spending from consolidated revenue, but Australia has administrative schemes which circumvent this problem. At Commonwealth level, there is a discretionary compensation mechanism, known as the CDDA Scheme. One of the remedies available under that scheme is for a government agency to make an *ex gratia* payment to an applicant which it has directly caused to experience detriment as a result of defective administration in circumstances where there is no other viable avenue to provide redress.

The CDDA Scheme 'is a valuable and important means of securing administrative justice in a complex system', and is particularly apt to dealing with situations in which people have relied on soft law but cannot enforce it. To the extent that agencies are reluctant to grant compensation under the scheme in circumstances where it would be justified, or otherwise to minimise the amount paid, the Ombudsman's office has recently exercised its 'system fixing' role by highlighting these deficiencies. This is useful for a number of reasons, not least because the Ombudsman can be expected to reach an independent and somewhat authoritative view as to whether an agency’s failure to adhere to soft law which it has issued is enough to constitute 'defective administration'.

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246 Auckland Harbour Board v R [1924] AC 318, (*Auckland Harbour*).


249 Finance Circular No. 2009/09, Attachment D.

250 McMillan, above n 229, 17.


252 The CDDA Scheme guidelines give the following example of the possible misunderstandings that can be made in regard to the requirement that financial detriment be consequent on defective administration: 'Financial detriment should be distinguished from financial disappointment. … An applicant does not suffer financial detriment merely because he or she was not granted a benefit after being advised he or she was entitled to that benefit.' Commonwealth Department of Finance and Deregulation, 'Finance Circular No. 2009/09: Discretionary Compensation and Waiver of Debt Mechanisms' (2009/09, 2009), Attachment A, [47].
Of course, the CDDA Scheme is limited to providing financial compensation. In circumstances where this is not appropriate (for example, it would not have been relevant to Ms Tang), the broader remedial focus of the Ombudsman is still able to achieve results.

V CONCLUSION

Soft law is highly and increasingly pervasive in Australia, as in other jurisdictions. It is a form of regulation which has become popular for reasons which are readily understandable. It is easily made, and changed, and requires no legislative oversight. While it is true that the *Legislative Instruments Act 2003* (Cth) states that a legislative instrument is ‘not enforceable by or against the Commonwealth, or by or against any other person or body, unless the instrument is registered’ in the Federal Register of Legislative Instruments, this may not be a practical issue where a majority of people think that an instrument is enforceable. This is why soft law is referred to as ‘law’; it has a practical effect which is very much like primary or secondary legislation. The problem is that this effect is not symmetrical. In other words, soft law only has a ‘law-like’ effect on individuals, but cannot be enforced against public authorities as ‘hard law’ could.

This state of affairs means that the available judicial remedies for breach of soft law by public authorities are fairly unsatisfying. Private law remedies are limited to circumstances in which the soft law instrument can either be understood as a negligent misrepresentation or as an inducement giving rise to an estoppel which is able to be remedied with an order for equitable compensation. These circumstances are, to say the least, infrequent. Public law is similarly limited, because its remedies attach only to administrative action which discloses a jurisdictional error in Australia. Unlike their UK counterparts, Australian courts have refused to provide a substantive judicial review remedy for disappointment of a legitimate expectation, meaning that the most one can say of soft law in Australia is that it may in some circumstances constitute a mandatory consideration to be taken into account by a decision-maker. The remedy for breach of this requirement would never be any more than procedural in nature.

It follows that the most effective remedies for breach of soft law by public authorities are also ‘soft’, in the sense that they are not determinative but are able to be obtained through influence and consent. The role of the Ombudsman in this process is central and serves to emphasise the role that that institution has in ensuring that administrative justice is done in Australia.

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254 *Legislative Instruments Act 2003* (Cth) s 31. See also *Argument*, above n 16, 138.